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UTILITIES COMMISSION

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Attorneys for the Idaho Conservation League and Sierra Club

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER)	
COMPANY'S PETITION TO MODIFY TERMS)	CASE NO. IPC-E-15-01
AND CONDITIONS OF PURPA PURCHASE)	
AGREEMENTS)	
_____)	
IN THE MATTER OF AVISTA)	
CORPORATION'S PETITION TO MODIFY)	CASE NO. AVU-E-15-01
TERMS AND CONDITIONS OF PURPA)	
PURCHASE AGREEMENTS)	
_____)	
IN THE MATTER OF ROCKY MOUNTAIN)	
POWER COMPANY'S PETITION TO)	CASE NO. PAC-E-15-03
MODIFY TERMS AND CONDITIONS OF)	
PURPA PURCHASE AGREEMENTS)	
_____)	

Idaho Conservation League and the Sierra Club

Direct Testimony of Adam Wenner

April 23, 2015

1 Q. What is your name and background?

2 A. My name is Adam Wenner. I am a partner at Orrick, Herrington and Sutcliffe, LLP, and
3 work in the Washington DC office. Prior to working at Orrick, I served as an attorney in the
4 Federal Energy Regulatory Commission (“FERC”) Office of the General Counsel, from 1976-
5 1981. During my term at the FERC, I worked with a staff team that was responsible for drafting
6 and implementing regulations under the Public Utility Regulatory Policies Act of 1978
7 (“PURPA”). In that capacity I am listed as one of the four staff contacts for the FERC’s order
8 adopting regulations implementing section 210 of PURPA, which requires electric utilities to
9 purchase electric power from and sell electric power to qualifying cogeneration and small power
10 production facilities (“QFs”), and to pay rates based on the utility’s avoided costs. These
11 regulations require state regulatory commissions to implement the FERC regulations.

12 Since leaving FERC in 1981, I have worked as an attorney in the electric power industry
13 and have handled many matters relating to PURPA.

14

15 Q. As a staff member, you did not vote on the rules that FERC issued, correct?

16 A. That is correct. I and the other members of the group working on PURPA
17 implementation drafted proposed rules, participated in conferences around the country,
18 reviewed and analyzed comments filed in the rulemaking proceeding, and drafted a
19 recommended final rule that FERC voted to adopt.

20

21 Q. What is the purpose of your testimony?

22 A. I have been asked to provide my opinion regarding a proposal before the Idaho Public
23 Utility Commission (“Idaho PUC”) in the above-styled docket regarding the PURPA and FERC
24 requirements for long-term power purchases from QFs. In this docket the Idaho PUC is

1 considering a proposal (“Petition”) by Idaho Power Company (“Idaho Power”) to direct that the
2 maximum required term for prospective Idaho Power PURPA energy sales agreements be
3 reduced from 20 years to two years.

4

5 **Q. Do you have an opinion as to whether this approach is consistent with PURPA and the**
6 **FERC’s PURPA regulations and decisions?**

7 **A. Yes. In my view this approach does not satisfy the FERC’s regulations and is inconsistent**
8 **with PURPA.**

9

10 **Q. Please explain the basis for your opinion.**

11 **A. There are two grounds for my opinion: (1) the PURPA legislation and the FERC**
12 **regulations require that QFs be paid capacity payments when their commitment to provide**
13 **energy to a utility enables the utility to replace new capacity with QF purchases. Capacity can**
14 **only be replaced when QF power is guaranteed to be available for a term that is sufficiently long,**
15 **in terms of the utility planning horizon – which typically involves twenty-year or longer service**
16 **lives for the “avoided” generating unit that is displaced by QF energy and capacity; and (2) the**
17 **FERC regulations provide QFs, at their option, the legal right to provide energy and capacity to a**
18 **utility pursuant to a “legally enforceable obligation”, over a term specified by the QF, in which**
19 **the QF is paid based on projections of avoided costs, determined at the time that the obligation is**
20 **incurred. FERC has interpreted this regulation to mean that by making a binding offer to sell its**
21 **power over a specified term, the QF obligates the state commission to impose a legally**
22 **enforceable obligation to purchase the QF’s power over the specified term, at rates based on**
23 **projected avoided costs. An Idaho PUC policy that limits legally enforceable obligations to**

1 purchase from QFs to a two year period would be inconsistent with and in violation of the
2 FERC's regulation.

3

4 Q. Please elaborate on the first reason that you identify above for concluding that Idaho's
5 proposal to limit QF contracts to two years is not appropriate.

6 A. As FERC noted in Order No. 69 in a discussion about whether avoided costs should
7 include capacity payments as well as energy payments, the Conference Report issued by Congress,
8 in conjunction with section 210 of PURPA, stated:

9 The conferees expect that the Commission in judging whether the electric
10 power supplied by the cogenerator or small power producer will replace future
11 power which the utility would otherwise have to generate itself either through
12 existing capacity or additions to capacity or purchase from other sources will take
13 into account the reliability of the power supplied by the cogenerator or small
14 power producer by reason of any legally enforceable obligation of such
15 cogenerator or small power producer to supply firm power to the utility.

16
17 *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the*
18 *Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 (1980),
19 45 Fed. Reg. 12,214, 12,225 (Feb. 25, 1980) ("Order No. 69") (quoting Conference Report on
20 H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 99, 95th Cong., 2d.
21 Sess. (1978)).

22 Based on this Congressional intent of PURPA, FERC observed, in Order No. 69, that:

23 In order to defer or cancel the construction of new generating units, a
24 utility must obtain a commitment from a qualifying facility that provides
25 contractual or other legally enforceable assurances that capacity from alternative
26 sources will be available sufficiently ahead of the date on which the utility would
27 otherwise have to commit itself to the construction or purchase of new capacity.
28 If a qualifying facility provides such assurances, it is entitled to receive rates based
29 on the capacity costs that the utility can avoid as a result of its obtaining capacity
30 from the qualifying facility.

31
32 45 Fed. Reg. at 12,225.

33

1 Q. How does this instruction by FERC apply to an Idaho QF's right to a purchase contract
2 of more than two years?

3 A. The FERC's language is straightforward. If a QF enters into a contract or provides "legally
4 enforceable assurance" that it will be available on the date that the utility would otherwise make a
5 commitment to construct new generating capacity, then the QF is entitled to payments based on
6 the avoided cost of constructing the new generating unit. A new conventional coal or gas-fired
7 plant has a service life in excess of 20 years, and therefore can only be replaced by power from
8 QFs if the QFs are obligated to provide power for a term at least that long. Conversely, if a QF
9 contracts or legally enforceable obligations are limited to two years, that power cannot be
10 counted on to be available after two years, and so a utility could not cancel planned generation
11 based on such a short commitment. The FERC's statement in Order No. 69 accordingly must be
12 read to require that sufficiently long contract terms or legally enforceable obligations are available
13 to enable planned generation to be canceled, a requirement that is not consistent with a two-year
14 term.

15

16 Q. Are there other provisions of the FERC's regulations under PURPA that shed light on
17 this issue?

18 A. Yes. Section 292.304(d)(2) of the FERC's rules states that a QF has the option to provide
19 energy or capacity on an "as-available" basis, or pursuant to a "legally enforceable obligation for
20 the delivery of energy or capacity over a specified term."

21

22 Q. Does the QF have options with respect to the determination of its avoided cost rate, if it
23 chooses the second option, namely to provide energy pursuant to a "legally enforceable
24 obligation for the delivery of energy or capacity over a specified term"?

1 A. Yes. Section 292.304(d)(2) states that the QF has the option to receive avoided cost rates
2 calculated at the time of delivery or at the time the obligation is incurred.

3

4 Q. Do the FERC rules specify a specific number of years or other time period for the term
5 over which the QF which accepts a legally enforceable obligation is entitled to receive avoided
6 cost rates calculated at the time the obligation is incurred?

7 A. No. However, there are many provisions of the rules and of FERC's decisions applying its
8 rules that provide guidance on this topic.

9

10 Q. Please describe these provisions.

11 A. First, FERC has explained that section 292.304(d)(2) gives a QF the right to establish a
12 fixed contract price for its energy and capacity at the outset of its obligation. Order No. 69,
13 FERC Stats. & Regs. ¶ 30,128 at 30,880).

14

15 Q. Did FERC explain that the section 292.304(d)(2) right to a fixed price contract means
16 that a QF has a right to a contract or legally enforceable obligation based on projected avoided
17 costs?

18 A. Yes. Section 292.304(d)(2) provides that a QF has the option to sell on an "as-available"
19 basis, or pursuant to a legally enforceable obligation, over a specified term. In the latter case, the
20 QF has the option to select rates that are calculated at the time that the obligation is incurred.

21

22 Q. Are there instances in which FERC characterized the right of a QF to a fixed-rate
23 contract or legally enforceable obligation under section 292.304(d)(2) as giving a QF the right,
24 at its option, to a long-term contract?

1 A. Yes. In its discussion in Order No. 69 of “levelized avoided cost payments,” FERC noted
2 that that “[a] facility which enters into a *long term contract* to provide energy or capacity to a
3 utility may wish to receive a greater percentage of the total purchase price during the beginning
4 of the obligation.” 45 Fed. Reg 12,224 (emphasis added).

5

6 Q. Has Idaho interpreted section 292.304(d) as granting a QF the right, under PURPA, to a
7 long-term fixed contract?

8 A. Yes. In its 1984 decision affirming an order by the Idaho PUC requiring Idaho Power
9 Company to enter into a thirty-five year contract to purchase power from a QF, the Idaho
10 Supreme Court stated that “FERC’s intent that [QFs], at their option, could enter into fixed-term
11 contracts is manifested by” the above-quoted language from Order No. 69 regarding long-term
12 contracts. *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 786, 693 P.2d 427, 432 (1984)
13 (“*Afton Energy*”).

14

15 Q. Did the Afton Energy decision indicate the basis for the thirty-five year contract term
16 proposed by the QF and imposed by the Idaho PUC?

17 A. Yes. The decision states “[t]he thirty-five year period corresponds to the life of Idaho
18 Power’s own thermal unit that can be “avoided” by purchasing power from the [QF].” *Afton*
19 *Energy*, 107 Idaho at 783, 693 P.2d at 429.

20

21 Q. Is that reasoning consistent with the concept of avoided costs, as defined by FERC in
22 Order No. 69?

23 A. Yes. The provisions that are referenced above, relating to the circumstances in which a
24 QF can receive capacity payments by enabling the purchasing utility to alter its capacity

1 expansion plans based on the obligation to provide power in the future, inherently contemplate
2 that the QF's legally enforceable obligation will be sufficiently long to accomplish this result. This
3 is consistent with the Idaho PUC's order as affirmed by the Idaho Supreme Court in Afton
4 Energy.

5 If a state commission adopts rules under which a utility is permitted to limit the purchase
6 obligation to a term that is too short to enable it to affect the utility's planning, then the state
7 commission will have failed to implement the FERC's regulations permitting capacity payments.

8
9 **Q. What other provisions are relevant to this issue?**

10 A. Section 292.302(b)(2) requires utilities to make available the utility's plans for the
11 addition of capacity, purchases of firm energy and capacity, and capacity retirements for each
12 year during the succeeding ten years. The ten-year horizon is consistent with the long-term
13 planning associated with utility capacity additions, and is indicative of the time frame that FERC
14 concluded was necessary in order for QFs to compute the avoided costs on which their contracts
15 or other legally enforceable obligations would be calculated.

16
17 **Q. Are there other provisions of the FERC's rules that shed light on this topic?**

18 A. Yes. Section 292.304(e) identifies factors which are to be taken into account in
19 determining the avoided cost rate to which a QF is entitled. One of the factors listed is: "(iii) the
20 terms of any contract or other legally enforceable obligation, including the duration of the
21 obligation, termination notice requirement and sanctions for non-compliance."

22
23 **Q. Did the FERC discuss this provision in its order adopting the PURPA regulations?**

1 A. Yes. FERC stated that clause (iii) (quoted above) “refers to the length of time during
2 which the qualifying facility has contractually or otherwise guaranteed that it will supply energy
3 or capacity to the electric utility.” Order No. 69, 45 Fed. Reg. at 12,226.

4 A utility-owned generating unit normally will supply power for the life of the
5 plant, or until it is replaced by more efficient capacity. In contrast, a cogeneration
6 or small power production unit might cease to produce power as a result of
7 changes in the industry or in the industrial processes utilized. Accordingly, the
8 value of the service from the qualifying facility to the electric utility may be
9 affected by the degree to which the qualifying facility ensures by contract or other
10 legally enforceable obligation that it will continue to provide power. Included in
11 this determination, among other factors, are the term of the commitment, the
12 requirement for notice prior to termination of the commitment, and any penalty
13 provisions for breach of the obligation.

14
15 *Id.*

16
17 **Q. How is this provision relevant to the issue of the term that a state commission must
18 establish for QF sales?**

19 A. The rule states that the value of the QF’s power, and therefore its avoided cost payment, is
20 linked to the term over which it agrees, by contract or by accepting a legally enforceable
21 obligation, to provide power. Implicit in the rule is that the length of the term over which the QF
22 commits to provide power is a decision for the QF. Also, in discussing QFs’ right to capacity
23 payments, FERC stated, in the preamble to its PURPA regulations, that “capacity payments can
24 only be required when the availability of capacity from a qualifying facility or facilities actually
25 permits the purchasing utility to reduce its need to provide capacity by deferring the construction
26 of new plant or commitments to firm power purchase contracts.” Order No. 69, 45 Fed. Reg. at
27 12,225-26. FERC confirmed its position that “if a qualifying facility offers energy of sufficient
28 reliability and with sufficient legally enforceable guarantees of deliverability to permit the
29 purchasing electric utility to avoid the need to construct a generating plant, to enable it to build a
30 smaller, less expensive plant, or to purchase less firm power from another utility than it would

1 otherwise have purchased, then the rates for purchases from the qualifying facility must include
2 the avoided capacity and energy costs.” *Id.* at 12,226. A state commission PURPA
3 implementation that denies QFs the ability to enter into a contract or legally enforceable
4 obligation to provide long-term value to the utility, and thus to receive avoided cost payments
5 reflecting that value, is inconsistent with section 292.304(e)(iii).

6 **Q. Are you aware of orders by the Idaho PUC that discuss its view of the requirements of**
7 **PURPA and FERC’s regulations regarding contract length?**

8 A. Yes. I have reviewed Idaho PUC Order No. 33253, issued March 18, 2015. Citing *Afton*
9 *Energy*, 107 Idaho at 785-86, 693 P.2d at 431-32 and *Idaho Power v. Idaho PUC*, 155 Idaho 780,
10 782, 316 P.3d 1278, 1280 (2013) (“*Idaho Power*”), that order states that “PURPA, and regulations
11 implementing the Act, are silent as to contract length; consequently, the issue is in the [Idaho
12 PUC’s] discretion.” Idaho PUC Order No. 33253 at 2.

13
14 **Q. Do the references to *Afton Energy* and *Idaho Power* state that the issue of contract length**
15 **is in the Idaho PUC’s discretion?**

16 A. They do not. In *Afton Energy*, the Idaho Supreme Court stated that the Idaho PUC “did
17 not abuse its discretion in implementing the mandates of PURPA by requiring Idaho Power to
18 contract with Afton for the purchase of its power over a thirty-five year period.” *Afton Energy*,
19 107 Idaho at 786, 693 P.2d at 432. In *Idaho Power*, the Idaho Supreme Court simply noted that
20 “a state regulatory authority has discretion in determining the manner in which the rules will be
21 implemented, and may comply by issuing regulations, by resolving disputes on a case-by-case
22 basis, or by other action reasonably designed to give effect to FERC’s rules.” *Idaho Power*, 155
23 Idaho at 782, 316 P.3d at 1280 (citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982)), and that the
24 Idaho PUC has “broad discretion . . . in implementing FERC’s rules and in determining the

1 requirements for a legally enforceable obligation.” *Id.*, 155 Idaho at 787, 316 P.3d at 1285.

2 Neither decision gives the Idaho PUC discretion to establish maximum QF contract terms that
3 are inconsistent with PURPA or the FERC’s regulations thereunder.

4 Neither decision holds that the Idaho PUC has discretion to implement PURPA or the
5 FERC’s regulations thereunder by establishing a maximum contract length for QF that, by any
6 industry standard, does not enable the QF to receive “long-term avoided cost contract or other
7 legally enforceable obligation,” as mandated by Order No. 69 and confirmed by *JD Wind*.

8

9 **Q. Does Idaho Power express a position on this issue in its Petition?**

10 A. Yes. Idaho Power’s Petition states, at page 10, that “[d]etermination of the proper terms
11 and conditions of a required PURPA energy sales agreement, including the authority to
12 determine the proper price, *the proper term*, and the authority to approve or disapprove the
13 contract itself is soundly, and completely, within the authority and discretion of the [Idaho
14 PUC.” (emphasis added). It also states, at page 35, that the require term for such a purchase “is
15 within the authority and discretion of the [Idaho PUC] to determine and set.”

16

17 **Q. In your opinion would an Idaho PUC order establishing a maximum required term of
18 two years for Idaho QF PURPA contracts be consistent with PURPA and the FERC’s regulations
19 under PURPA?**

20 A. Such an order would not be consistent with PURPA or the FERC’s regulations
21 thereunder. As explained above, PURPA and the FERC regulations grant QFs the right to a
22 contract or legally enforceable obligation to sell energy and capacity at long-term avoided costs.
23 In the electric utility industry, and as discussed in my testimony, a two-year term fails to permit a
24 QF to estimate, with reasonable certainty, the expected return on its potential investment in a

1 QF, and would frustrate the requirement of section 210 of PURPA that FERC's rules, as
2 implemented by state commissions, encourage cogeneration and small power production.

3

4 Q. Does this conclude your testimony?

5 A. Yes.

6

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2015, I delivered true and correct copies of the DIRECT TESTIMONY OF ADAM WENNER, DIRECT TESTIMONY OF R. THOMAS BEACH, and, EXHIBITS 301 – 303 on behalf of the Idaho Conservation League and the Sierra Club the following persons via the method of service noted:

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